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No. 07-137

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS H. BARANOWSKI
Petitioner,

v.

LARRY HART, et al.,
Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Baranowski continues to have standing when during this litigation he has voluntarily changed his designated religious preference away from Judaism to now be "none."

2. Whether the court of appeals was correct to affirm a summary judgment granted against Baranowski on his claim under the Religious Land Use and Institutionalized Persons Act for failure to show a "substantial burden."

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OTHER

Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes,* 65 S. Cal. L. Rev. 845 (1992). 10

In this petition for certiorari review, Baranowksi argues that the Fifth Circuit's application of the RLUIPA "substantial burden" standard is inconsistent with the approach of other circuits and conflicts with Supreme Court doctrine. However, Baranowksi failed to preserve any issue for review and this Court now lacks jurisdiction to consider those claims. Alternatively, his claims are wholly without merit, and this writ of certiorari should be denied.

STATEMENT OF THE CASE

The petition omits the facts relevant to the Court's consideration of whether Baranowski has standing to assert a Religious Land Use and Institutionalized Persons Act (RLUIPA) claim in regard to these religious services.

In 1998, on a form provided by the prison system to facilitate the accommodation of prisoners' beliefs, Baranowski changed his designated religious preference from "none" to "Judaism-Hebrew." (App. A at 3).

In 2003, Baranowski filed the claim at issue in this petition, contending that the RLUIPA was violated when he was unable to attend Friday night services on four specified dates on which a rabbi was unavailable to participate. (Pet. App. B at 32).

The district court eventually granted summary judgment to the defendants on all claims. On the single claim relevant to this petition for certiorari, the court held that Baranowski failed to survive summary judgment on his claim that his rights were substantially burdened within the meaning of RLUIPA when he was unable to attend religious services on four occasions when a volunteer religious officiant chose not to come to his unit. (Pet. App. B at 32). Baranowski appealed.

During the pendency of his appeal, Baranowski elected to change his designated religious preference to "none." (Pet. App. B). To the best of defendants' knowledge, that is Baranowski's most recent designation.

After the Fifth Circuit affirmed that judgment on May 4, 2007, two interest groups (the Aleph Institute and Jewish Prisoner Services International) moved to intervene and moved for panel rehearing. Those groups noted that Baranowski had changed his official religious affiliation from "Jewish" to "none," arguing that this deprived him of standing to pursue his claims. (App. B). The state officials filed a response representing that they had previously been unaware that Baranowksi had changed his designated religious preference.[1] The Fifth Circuit denied the proposed intervenors' motions on

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1 The state defendants responded to this motion by arguing that this case could be saved from the mootness doctrine by the 'capable of reptition yet evading review' exception. Standing, however, present a different set of prudential concerns. And this Court – if it grants review and hears argument – may well reach the conclusion that the case must be dismissed for want of standing.

June 8, 2007.

REASONS FOR DENYING THE PETITION

I. There Are Serious Questions Whether Baranowski Now Has Standing To Pursue This Prospective Relief Given His Changing Religious Designation.

This case makes a remarkably poor vehicle to address the meaning of this statute because there are serious questions about Baranowski's standing, as he no longer claims to be Jewish. Baranowski has changed his faith from "Jewish" to "none." (App. B at 23, 29). This Court should not grant review.

To have Article III standing, Baranowski must allege that his "particular freedoms are infringed" *Sch. Distr. Of Abington v. Schempp,* 374. U.S. 203, 224 n.9 (1963). Because Baranowski sought prospective relief as a Jewish inmate, a position he has voluntarily relinquished, he is not suffering an "actual or imminent" injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Baranowski lacks standing to maintain this action. *Craig v. Boren,* 429 U.S. 190, 192 (1976).

At worst, Baranowski lacks standing because he no longer is the proper plaintiff to be pursuing prospective relief about the availability of religious services for Jewish inmates. At best, Baranowski's claim would involve complex questions regarding whether there exists an alleged circuit split. Those are questions not briefed or addressed by the courts below, and that are better dealt

with in a case involving a plaintiff who presents them straightforwardly.

II. There Is No Meaningful Split Warranting This Court's Intervention.

In framing a circuit split, the petition:

1) overstates the absoluteness of the Fifth Circuit's rule, creating the false impression that the circuit's controlling precedent does not permit analysis of a plaintiff's particular circumstances — which it does;

2) treats other circuits' *land-use cases* as being equivalent to their prisoner cases — which subsequent cases from some of those circuits have made clear is not the complete picture; and

3) ignores the reality that the various circuits' view of this area is *converging* in the wake of recent decisions, suggesting that percolation of these fine-grained issues in the lower courts may yet resolve any remaining disagreements.

A. Contrary to the Petition's Characterization, the Fifth Circuit's Rule Expressly Permits Consideration of the Plaintiff's Individual Circumstances.

The petition seems aimed more at the Fifth Circuit's prior decision in *Adkins v. Kaspar,* 393 F.3d 559 (5th Cir. 2004), *cert. denied,* 545 U.S. 1104 (2005), than at the decision below. Indeed, it is the Fifth Circuit's formulation

of the rule in Adkins that is attacked rather than the application of that rule to the facts of this case.

The petition asserts that Adkins "refused to engage in an adherent-base analysis," Pet. 2, and that Adkins' rule ignored the "particular circumstances" of the case, Pet. 4. But the Fifth Circuit in Adkins — in language quoted by the court of appeals in this case — made clear that its rule does permit such an analysis:

> "The [*Adkins*] court cautioned, however, that 'our test requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a significant burden on an adherent's religious exercise...."

See Pet. App. 19 (quoting *Adkins*, 393 F.3d at 571).

It is simply untrue that the Fifth Circuit has categorically rejected such a possibility. To the contrary, it has expressly left the door open for a plaintiff to offer such proof in summary judgment. Here, Baranowski failed to offer sufficient evidence to meet his summary judgment burden, and his complaint boils down to a disagreement over the assessment of those facts, not any bright-line legal rule that might warrant this Court's intervention.

B. The Cases Offered by Baranowski Merely Show a Distinction Between Prison Cases and Land-Use Cases, *Not* a Divergence Among the Circuits Regarding Prison Cases.

Baranowski tries to conjure up a circuit split by citing to a number of cases from other circuits that — although they deal with RLUIPA — deal with the context of land-use cases rather than institutionalized-person cases. As those circuits have themselves acknowledged in other decisions, that distinction makes a critical difference. Indeed, three of those circuits have expressly applied a test like the Fifth Circuit's test in regard to institutionalized-person cases. The so-called "split" is really a substantive distinction between different categories of cases and hardly warrants this Court's intervention.

The Ninth Circuit case is explained as a distinction between land-use cases and prison-policy cases. Baranowksi cites to a Ninth Circuit *land-use* case, *San Jose Christian Coll. v. City of Morgan Hill,* 360 F.3d 1024 (9th Cir.2004), in which the court determined that "a substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise." *San Jose,* 360 F.3d at 1034. Subsequent to *San Jose,* however, the Ninth Circuit addressed the prison-policy context. In that case, it did not cite that language from *San Jose* but instead cited with approval to both *Thomas v. Review Bd. of Indiana Employment Security Div.,* 450 U.S. 707 (1981) and *Sherbert v. Verner,* 374 U.S. 398 (1963) to conclude that a prison grooming policy

substantially burdened an inmate's religious exercise. *Warsoldier v. Woodford,* 418 F.3d 989 (9th Cir. 2005). "Because the grooming policy intentionally puts significant pressure on inmates such as Warsoldier to abandon their religious beliefs by cutting their hair, CDC's grooming policy imposes a substantial burden on Warsoldier's religious practice." *Id.* (citations omitted)

Baranowksi contends that the Eleventh Circuit's decision in *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004), *cert. denied,* 125 S. Ct. 1295 (2005), evidences a circuit split. However, *Midrash* was a land-use case and, since the filing of this petition, the Eleventh Circuit has issued an opinion in a prisoner case which more closely follows the holding in *Thomas.* In *Smith v. Allen,* No. 05-06010, 2007 WL 2826759 (11th Cir. Oct. 2, 2007), a prisoner who claimed to be an adherent of the Odinist faith filed suit after prison officials denied his request to have a quartz crystal. The court defined a "substantial burden" as being "significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Smith,* 2007 WL 2826759 * 17 (citing *Midrash,* 366 F.3d at 1227). In order to constitute a "substantial burden" on religious practice, the government's action must be "more than ... incidental" and "must place more than an inconvenience on religious exercise." *Id.* (citation omitted). That is, to constitute a substantial burden under RLUIPA, the governmental action must significantly hamper one's religious practice. *Id.*

Similarly, in a case cited to by Petitioner, the Fourth Circuit cited to *Thomas* when it found that a substantial burden on religious exercise occurs when a state or local government, through act or omission, "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Lovelace v. Lee,* 472 F.3d 174, 187 (4th Cir. 2006), (citing *Thomas,* 450 U.S. at 718).

Although Baranowksi argues that the First Circuit's definition conflicts with the Fifth Circuit, this assertion is incorrect because the First Circuit has not yet ruled on the merits of this issue. In *Spratt v. R.I. Dept. Of Corrs.,* 482 F.3d 33 (1st Cir. 2007), it noted that the district court "decided that a 'substantial burden' is one that 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs. *Spratt,* 482 F.3d at 38 (citations omitted). The First Circuit never addressed the merits, but merely assumed "arguendo that *Thomas* applies." *Id.* Certainly, the First Circuit should be given the opportunity to reach that question squarely before it is deemed to be in such tension with the Fifth Circuit that certiorari would be warranted.

C. As Those More Recent Circuit Decisions Drive Home, the Circuits' View of This Area Is Converging as These Issues Percolate Below.

As the circuits have time to consider a wider variety of cases and this Court's recent guidance, their decisions will converge. What once appeared to be disagreements are being ironed out as circuits work through the different standards that might apply to totally different classes of

cases. Some of the decisions on which Baranowski relies are no longer even the authoritative statement on this subject within their own circuit. Indeed, since the filing of this petition, two new opinions have been issued. The Third Circuit recently concluded that a substantial burden exists where:

1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behaviour and to violate his beliefs. *Washington,* 497 F.3d at 280.[2] Also, as already noted, the Eleventh Circuit issued its opinion in *Smith* on October 2, 2007.

RLUIPA is a new statute, enacted in 2000. Courts delayed reaching the merits of these cases pending the outcome of the Establishment Clause challenge in *Cutter v. Wilkinson,* 544 U.S. 709 (2005). Only a few circuits have yet spoken to the question what constitutes a "substantial burden." Those circuits are becoming more consistent in their approach and have correctly defined the term "in light of the purposes Congress sought to serve," *Chapman,* 441 U.S. at 608, by interpreting cases in light

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[2] The Third Circuit opined that the Fifth Circuit has "enunciated the proper standard" because it incorporates the holdings of both *Sherbert* and *Thomas* while also requiring that the burden on religious exercise be substantial. *Washington,* 497 F.3d at 280 n 7.

of this Court's jurisprudence set out in *Sherbert* and/or *Thomas*. Because these issues need time to percolate, the petition should be denied.

III. In Any Event, the Fifth Circuit's Resolution of This Case Comports with the Statute and With Precedent.

Congress did not define the term "substantial burden" in RLUIPA. However, in a Joint Statement that appeared in the Congressional Record, the section on the definition of substantial burden states that "[t]he Act does not include a definition of the term 'substantial burden' because it is not the intent of this Act to create a new standard for the definition of 'substantial burden' on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence." 146 Cong. Rec. S7774, 7776 (July 27, 2000).[3] Because the Fifth Circuit correctly complied with the intent of Congress and has followed Supreme Court jurisprudence, this petition should be denied.

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[3] *See also* Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S.Cal. L. Rev. 845, 853 (1992) ("A fairly common function of legislative history is explaining specialized meanings of terms or phrases in a statute which were previously understood by the community of specialists (or others) particularly interested in the statute's enactment."); *Champman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979) (As in all cases of statutory construction, the task is to interpret the words of the statute in light of the purpose Congress sought to serve.")

In *Sherbert*, a Sabbatarian was refused unemployment benefits when she could not find employment because she declined to work on Saturday. This Court found that a substantial burden exists when a follower is forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." This Court examined this issue again in *Thomas*. Thomas, a Jehovah Witness, was denied unemployment benefits after he quit his job because of his religious beliefs. Citing to *Sherbert*, this Court held that

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Finally, the Fifth Circuit reviewed the decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), a case in which a Native American organization sought to block construction of a road the government wanted to build through an area of public

land used by several Native American tribes. This Court, in denying the plaintiffs' First Amendment claim, rejected their interpretation of *Thomas* and *Sherbert*, because that interpretation implied that "'incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions.'" *Id.* at 450-51 (citing *Sherbert*).

The Fifth Circuit has formulated its definition based on the analyses set out in *Sherbert, Thomas* and *Lyng*:

> [A] government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs. *See Sherbert* and *Thomas*. On the opposite end of the spectrum, however, a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is

not otherwise generally available or acting in a way that is not otherwise generally allowed. *Adkins*, 393 F.3d at 569-70 (citing *Lyng*).

Because the Fifth Circuit has complied with Supreme Court precedent, the petition should be denied.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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APPENDIX A

No. 05-20646

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS H. BARANOWSKI
Plaintiff-Appellant
v.
CHAPLAIN LARRY HART; LAWRENCE N. HOGES, Huntsville Unit Warden; TED SANDERS, Rabbi TDCJ Chaplaincy Department; BILL PIERCE, TDCJ Chaplaincy Department; DOUGLAS DRETKE, TDCJ-ID Director
Defendants-Appellees

BARANOWSKI'S PRO SE APPELLANT BRIEF

MAY IT PLEASE THIS HONORABLE APPEALS COURT:

Pursuant to appellate rules for this circuit, Plaintiff-Appellant **THOMAS HUNTER BARANOWSKI** ["Baranowski"] presents this his PRO SE APPELLANT BRIEF in support of his claims summarily denied and dismissed by the Southern District Court at Houston, Texas in the civil rights case numbered 4:03-cv-3893 and styled as above whereafter same was dismissed by the

Honorable John D. Rainey on or about July 15, 2005.

I. JURISDICTION, This is an appeal from the sole adverse judicial decision of the Southern District of Texas to dismiss Baranowski's claims with prejudice. Effective this date, opposing counsel has been served a carbon copy of this brief by general postage delivery.

II. PARTIES: The parties involved in this civil action are identified as, but not limited to the following:

THOMAS HUNTER BARANOWSKI · Plaintiff

LARRY G. HART · Defendant

LAWRENCE N. HODGES · Defendant

BILL PIERCE · Defendant

DOUGLAS DRETKE · Defendant

Many other defendants have been individually and officially and personally and ministerially involved in many instances which occurred at the hands of state officials who are named and/or referred to within the many motions/legal papers contained in the records of this religious litigation brought by plaintiff Baranowski.

III. HISTORY OF THE CASE:

Sometime in 1998 Baranowski advised Texas prison officials that he desired to update his religious affiliation [from NO PREFERENCE to JUDAISM–HEBREW] and further advised unit authorities that he wished to return to his practice of said religion while he was attending Tarleton University's Bachelor Program at the Alfred Hughes unit in Gatesville, Texas. When officials refused to honor his request, Baranowski spoke with then chaplain [James Gallagher] whereinafter he was advised to file an administrative grievance. Soon thereafter Baranowski was transferred to the Mark Michael unit in Tennessee Colony, Texas where he was appointed to act as the coordinator for the Jewish community and permitted to conduct limited weekly–monthly holyday services. Because that unit did not have a four-year college program and because unit supervisors only whimsically allowed services, Baranowski sought a transfer to the Huntsville unit so that he'd be able to attend the Sam Houston State University Bachelor program and participate in religious services since this unit was allegedly designated as a "Jewish–enhanced services unit."

Prior to leaving the Michael unit, however, Baranovski and two other Jewish prisoners filed civil suits in the Houston Court due to the continued denial of Sabbath services. Once Baranowski was transferred to the Huntsville Unit, those issues momentarily became moot and the suit was dismissed without prejudice.

After several months at the Huntsville unit, the newly assigned chaplain [Larry Hart] implemented his personal biases and beliefs whereinafter he began to deny "non–spirit–filled" groups' access to their group services: in particular, adherents of the Jewish, Buddhist, Native American and Jehovah Witness's groups. Effective September 15, 2003, Defendant/Appellee Hart used the excuse that these groups did not have an outside volunteer to conduct services, therefore, services were discontinued.[1]

Inasmuch as Baranovski had made exhaustive attempts to informally resolve the problems, unit administrators continued to deny and deprive Jewish prisoners access to Sabbath services. Having been unsuccessful in his plight, Baranowski contacted the Department of Justice Civil Rights Division and Southern District Judge Vanessa Gilmore with a laundry list of violations afterwhich Judge Gilmore instructed the Court Clerk to file and generate Baranowski's religious claims under Baranowski v. Hart, et al., No. H-03-3893, effective September 13, 2003 and same was, because of judicial rotation, assigned to Judge John D. Rainey and Magistrate Nancy Johnson.

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1 Just as prisoners of the Muslim and Jehovah Witness' faith groups, Jewish prisoners attending services have a Rabbinical–approved coordinator assigned to lead Jewish prisoners in prayer services. in line with Hyde v. TDCJ, 948 F. Supp. 625 (S.D. Tex. 1996) and Brown v. Beto. It should also be noted here that back around 1990, Jewish prisoners were bused to the Hunstville unit for inmate–coordinator led prayer services, without official interference.

IV. FACTS OF THE CASE:

Baranowaki's general civil rights complaint shows that he and approximately twenty (20) prisoners of the Jewish faith are routinely being:

[A] denied access to Jewish Sabbath and other Holy Day services as mandated by the Code of Jewish Law.

[B] deprived of Jewish prayer service–fellowship as set forth under the Code of Jewish Law.

Baranovski declares that on each and every Jewish Sabbath [Friday] during the months of September and October 2003 and on each and every Saturday [Havdalah) during the months of October, November, December and thereafter, Jewish prisoners confined to the Huntsville unit were being denied access to the unit chapel to attend and celebrate Jewish services and were deprived of access and participation in Jewish prayer and fellowship, all of which discriminates against Jewish prisoners in keeping with their sincerely held beliefs and adherence to their religion [Judaism]. Furthermore, Jewish prisoners have been denied and deprived of celebrating High Holy Day services as revealed and supported in their individual administrative grievances on file and available through discovery.

[C] discriminated against by prison officials and other state agents.

[D] denied and deprived of proper, nutritious and adequate kosher foods consistent with mandates of the Code of Jewish Law regarding keeping kosher.

Jewish prisoners have been and continue to be denied and deprived access to proper dietary needs of appropriate caloric intake, for example: denial of a 25-hour fast of Yom Kippur on October 25-26, 2003]. These particular actions by Texas prison officials sorely discriminates against Jewish prisoners confined in and around the State of Texas. Prisoners are denied and deprived of kosher diets that conform with their religious beliefs– daily kosher diet as well as supplemental diets required for Jewish holydays. These dietary needs, Baranowski contends, contributes to the survival of Jewish people and, are utilized as a tool for discipline, helping to induce self–control and curb impulsive behavior, all of which are in line with the rehabilitative needs for all prisoners [Texas prison officials profess their intent to 'rehabilitate' offenders].

V. ISSUES FOR DE NOVO REVIEW:

In the interests of justice, plaintiff THOMAS HUNTER BARANOWSKI seeks de novo review of his civil rights claims, declaring that evidence would show as follows:

[1] the district court abused its discretion when it failed to:

(a) grant a Temporary Restraining Order, twice.

(b) grant Appointment of competent counsel, twice.

(c) grant an evidentiary hearing, twice.

(d) grant plaintiff an opportunity to file his Motion For Summary Judgment after the United States Supreme Court declared RLUIPA constitutional.

[2] the district court abused its discretion by dismissing the civil action without allowing an evidentiary hearing so Baranoweki could present evidence in support of the issues in his complaints.

[3] the district court erred in its decision by denying both parties of their day in Court which they could legally demand under federal rules.

[4] the district court abused its authority when it plainly rubber–stamped the defendants generalized summary judgment without allowing plaintiff the opportunity to "flesh-out" any unresolved issues contained within this suit [e.g. facts of Jewish Law[2]].

[5] the district court erred in its decision when it systematically dismissed Baranowski's suit without truly testing the validity of the defendants Motion For Summary Judgment which contained misrepresented

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2 The Jewish Sabbath begins each week on Friday at sunset and ends twenty-four (24) hours later on Saturday (Havdalah) at sunset. Pursuant to Jewish custom, Jews are commanded to observe the Sabbaths and High Holy Days "in all your dwelling places . . . as a perpetual status . . . throughout your generations." SEE Leviticus 23:3,8,14,21,31,41. JUDAISM, the very first religion to teach belief in one God, is the religion of one people – the Jews. Ethically speaking, Judaism teaches that all people are created in God's image and deserve to be treated with dignity and respect. Jews are and have always been held to a stricter standard of religious observance. Even in prison.

information contrary to agency policy.

DISCUSSION

In this case, Baranowski understands that the First Amendment of the United States Constitution states:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to assemble, and to petition the Government for redress of grievance.

In theory, the Government may neither aid nor hinder the practice of a particular religion. Specifically, the First Amendment forbids an official purpose to disapprove of a particular religion or of religion, Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S.Ct. 2217, 2226 (1993). In the instant case, the prison officials genuinely promote the attendance of Christian–Catholic religions while interfering and hindering Jewish prisoners access to their mandated Sabbath (Friday)–Havdalah (Saturday) services. Even more serious is the fact that defendant Hart has impeded Jewish prisoners' free exercise of religious rights by refusing to accomodate an appropriate place of worship to conduct Jewish services.

Under the clear language of 42 U.S.C. Section 1983 and the Religious Land Use and Institutionalized Persons Act ["RLUIPA"), Baranowski has repeatedly shown that he and other Jewish prisoners are being denied and deprived of a guaranteed right by a person [or persons] acting under the color of state law. Many courts too, have held that a

convicted felon does not forfeit all constitutional protections because of his or her confinement in prison.

This Court must be alert to this factor as announced in Meachum v. Fang, 427 U.S. 215, 224-225 (1976). The claims which Baranowski herein raises create a "substantial burden" over his free exercise of religion.

As Baranovski has clearly stated in his administrative grievances, on–going civil rights complaints and advisory motion practice, the respondent prison officials have violated civil rights statutes by failing to accomodate Jewish prisoners' exercise of their religion in so many ways. And, to add insult to injury, the district court condoned these actions by "rubber–stamping" the said conduct as well as the respondents motion for summary judgment, thus evading the plaintiff's continuous claims of denial, deprivation and discrimination by state prisons officials. Baranowski relies on recent Supreme Court decisions to stand up for his plight to have the "substantial burdens" of religious discrimination lifted from Texas prisons. See e.g., Cutter v. Wilkinson, 125 S.Ct. 2113, 2115 (2005). ["The exercise of religion often involves not only belief and profession but the performance of ... physical acts such as assembling with others for a worship service or participating in sacramental use of bread and wine ..."] with Van Orden v. Perry, No.03-1500 (Decided June 27, 2005) ["Purpose of the First Amendment is to assure the fullest possible scope of religious liberty and tolerance for all"] and McCreary County v. ACLU, No.03-1693 (Decided June 27, 2005) [" ... that liberty and social stability demand a ...

tolerance that respects the religious views of all citizens"].. Unlike the defendant's [Hart] personal view that Jewish prisoners are a "non–spirit–filled" group, the above three cases reveal that the Supreme Court Justices consider "Jewish and Christian faiths" akin for constitutional protections. In the case before this Court, Baranowski reveals that the government [has] acted unconstitutionally" when it denied and deprived Jewish prisoners of their "right" to worship and congregate according to the tenets of their chosen religion— JUDAISM.

Once again, the district court took the official word of Texas prison officials over the pleas of help from Texas Jewish prisoners. Respondent are forcing Jewish prisoners to break the [Jewish] law of "no Sabbath breaking" whenever they deny and deprive Jewish prisoners the mandate to worship and congregate, all of which are discriminatory factors which cannot be permitted by the Court. Baranowski's original and supplemental legal papers show evidence of the moral and religious obligations Jewish prisoners are due by the State. The State of Texas receives federal funding to assist them in"federally funded programs", yet, when private [Jewish] organizations provide these prisoners with kosher foods at no–cost to the prison, state officials deny and steal these foods under the guise of security precautions. See EVIDENCE [TDCJ-CID] Grievance Nos. 2005153259 (baranowski) 2005153250 (white); 2005153245 (turner); 2005153242 (talamantes) and Complaints filed with Walker County District Attorney's Office regarding theft.

Further signs of discrimination by state officials could be evidenced when, just within the last month Christian faith group, KAIROS catered privately–funded meals to about 34 Texas prisoners over a three–day period without hesitation. Yet, whenever an established and approved Jewish organization provides Kosher food for its Jewish prisoners, Texas prison officials denied same for "security reasons". Baranowski contends and, evidence would prove that his requests for religious accomodations have not been excessive, nor do they impose unjustified burdens on the state or other institutionalized persons, and certainly do not jeopardize TDCJ-CID's effective functioning. See Cutter v. Wilkinson, 544 U.S. at 2116. See also, Benning v. Georgia, 391 F.3rd 1299, 1307 (CA11, 2004) ["Congress has every right to ensure that the state prisons that accept federal funds respect the religious freedom, of prisoners and promote their rehabilitation"].

Recently, and continuously, the Courts have held that "[T]he framers of the United States Constitution incorporated substantial religious protections into Article VI and the First Amendment of the United States Constitution to prevent religious discrimination". Moreover, when persons are excluded from participation in our democratic processes because of race, religion or gender the promise of equality dims and the integrity of our judicial system is jeopardized. See Casarez v. State, 913 S.W. 2d 468, 476, 481 (TCA 1994) (citing Swain v. Alabama, 380 U.S. 202, 220 (1965) and Sherbert v. Verner, 374 U.S. 398, 403-09 (1963)).

Baranowski's right to the free exercise of religion is unquestionably a fundamental right and any impairment [ergo, interference] is subject to strict scrutiny review. Texas, of all States, cannot shed its responsibilities to Jewish prisoners, especially when the Fourteenth Amendment to the United States Constitution protects Jewish prisoners, Cantwell v. Connecticut, 310 U.S 296, 296, 303 (1940).

Prison policies do substantially burden Baranowski's attempts to maintain a kosher diet and practice his chosen religion. Such burden puts substantial pressure on him to modify his behavior and to violate his sincerely held religious beliefs. Refer to: Thomas v. Review Board, 450 U.S. 707, 717-18 (1981); Kahane v. Colson, 527 F.2d 492 (CA2 1975) [First Amendment requires Orthodox Jewish prisoner receive a kosher diet].

Baranovski maintains that as a sincerely Torah–observant Jew, he is compelled by Judaism to adhere to Jewish law, consume kosher food, observe the Sabbath and other prescribed holy days and perform specific rituals, none of which interfere with or compromise prison security. These mandates also further his successful rehabilitation, something Texas prisons supposedly encourage.

Contained within his original civil rights complaint Baranowski demanded a jury trial. In their reply, the defendants also demanded "trial by jury". Inasmuch as the issues are ripe for a trial by jury, the defendants sought dismissal in any manner possible, first by saying that the Establishment Clause was unconstitutional, then by filing summary judgment motions. The lower court naturally obliged the respondents.

The district court had the opportunity to weigh and consider the precious nature of Baranowski's concerns. Judge Rainey, however, decided to partner–up with the Texas prison system—the same system that has steadily been under close scrutiny for its known abuse and serious violative animus and nature. That particular court, again, overlooked Baranowski's RLUIPA claims.

This Court of Appeals, especially, has the power and authority to correct the lower court's abuse of discretion and erroneous decision–making process.

There can be no doubt that Baranowski has made a prima facie case of religious discrimination by prison officials that have denied and deprived Jewish prisoners of their 'right' to practice their sincerely held belief protected by the First Amendment. Based on newly-enacted legislation which was recently upheld by the Supreme Court, RLUIPA protects the religious rights of prisoners and their right to religious services, kosher food, work–proscription days, observance of holydays and so forth. See Cutter v. Wilkinson, supra.

CONCLUSION

On Sunday, August 17, 2003, Texas prison chaplain Larry Hart made a discriminatory remark claiming that he intended to discontinue all non–spirit filled group services on the unit" after which he cancelled all existing religious services for Jewish, Buddhist, Native American and Jehovah Witness prisoners. Furthermore. together with the chaplain, Huntsville Unit officials denied and deprived Jewish prisoners of their Sabbath/Havdalah services, congregational worship–fellowship, access to holyday festival services and, of course, religiously mandated kosher food. Many other state prison officials fell into complicity with the defendant named inside this suit.

After filing internal complaints and exhausting administrative grievances, Baranowski sought federal intervention and a civil suit was filed. During the initial process, both parties demanded a jury trial, however, despite extensive motion practice, the district court granted defendants summary judgment and dismissed the suit with prejudice. Baranowski timely appeals the adverse decision of Judge John D. Rainey.

Based on case law and court decisions, Baranowski sincerely believes that the district court erred in its decision and further abused its discretion when it:

(a) failed to grant the parties their day in court.
(b) refused to grant the parties demand for a jury trial.

(c) denied plaintiff's motions for Temporary Restraining Order(s), Appointment Of Counsel and Evidentiary Hearing(s); twice.
(d) violated plaintiff's civil rights protections under RLUIPA and the First Amendment.
(e) condoned defendants civil rights violation of Jewish prisoners.
(f) selectively accepted defendants version of events over plaintiffs' evidence.
(g) refused to allow the plaintiff to file responsive Motion For Summary Judgment before granting defendants' Motion For Summary Judgment.
(h) refused to permit Magistrate Judge Nancy Johnson to hold an evidentiary hearing so the parties could "flesh-out" issues for trial by jury.
(i) denied appointment of counsel for plaintiff so as to protect the rights of plaintiff on issues triable by a jury.
(j) denied appointment of counsel [oe even stand-by counsel] to assist plaintiff to file motion for summary judgment.

FOR THESE REASONS, and more, Baranowski is of the opinion that this Honorable Court of Appeals should REVERSE the adverse decision and judgment of the lower district court and REMAND this civil suit to the district court with instructions for REAPPOINTMENT of an unbiased judge and APPOINTMENT of competent civil trial counsel to represent and/or assist Baranowski and other Jewish prisoners so that they may proceed to a jury trial.

EXECUTED on this the 30th day of September, 2005 and declaring under the penalty of perjury that the foregoing facts are true and correct and further stating that a true carbon copy of this instrument has been sent to: HON. JOHN M. ORTON, P.O. Box 12548, Austin, Texas 78711.

Respectfully submitted,

/s/ Thomas Hunter Baranowski
THOMAS HUNTER BARANOWSKI
Pro Se Plaintiff-Litigator
815 – 12th Street
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Thomas H. Baranowski
378384
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February 17, 2006

Hon. Charles R. Fulbruge, Clerk
U.S. Court of Appeals, Fifth Circuit
600 Camp Street, Room #102
New Orleans, La. 70130

RE: Baranowski -v- Hart, et al
USCCA No. 09-20646
CA. NO. H-03-3896 (Houston)

LETTER REPLY OF PLAINTIFF – APPELLANT

MAY IT PLEASE THE HONORABLE JUDGE OF THE COURT:

Plaintiff–Appellant Thomas H. Baranowski ["Baranowski"] submits this letter of reply in similar fashion answer to the letter brief filed by Defendants–Appellee and in support, Baranowski would present as follows:

OPENING STATEMENT

The main question this Honorable Court of Appeals should ask itself is: If the State of Texas and the

Department of Criminal Justice ["TDCJ"] are not violating the constitutional rights of Jewish prisoners, then why is their reply to Baranowski's appeal brief before this Honorable Court full of half– truths and blantant lies?

Baranowski asserts that this is the main reason that only a trial with sworn testimony shall put theses matters to the test and the perjurious presentations before the Court for sanctions and penalties.

A wise man once said, "Defense is complicated when truth and falsehoods are established," and "twisted words made to appear in the worst light, is the most subtle form of attack". It should be noted here that the State officials fighting against the constitutional rights of Jewish prisoners have raised these observations to the highest art.

Time – after – time, for years, and motion – after – motion, Baranowski has shown the nefarious attitudes of the Lone Star State of Texas Attorney General and its subordinates. It makes anyone wonder why this state leader or the state prison officials goforth before the Courts with such tenacious falsities.

Either the Attorney General is lying to the Court OR the defendants are lying to the Attorney General Or, BOTH! And, Baranowski makes that assertion based on the following facts which can be verified by the legal paper contained in this lawsuit.

-A-

FROM THE OUTSET Baranowski raised three particular constitutional issues, those being: denial of due process rights to practice his Jewish faith and deprivation of equal protection to hold and attend mandated Jewish services each and every Sabbath and, the defendants deliberate discrimination of Jewish prisoner.

Baranowski filed his lawsuit on the premise of these three grounds, seeking protection of the Federal courts for the ongoing constitutional violations by anti-semetic prison officials. The district court, instead, denied Baranowski's in depth motion practice, despite documentation, official complaints and witness affidavits which, at trial, would have shown major constitutional violations on the part of Texas prison officials. Purely, the defendants animus to prejure themselves is a customary practice both in and out of the judicial system. Lets see how Baranowski can prove up his contentions.

1...Of late, in their letter brief, defendants advise this Honorable Court of Appeals that they have limited resources and cannot provide requested Jewish services (page 5).

In the rebuttal, trial testimony would prove that christian services are conducted throughout the weeknights, on Saturday, and four times on Sunday. Muslim services are provided twice on Friday and Saturday and these adherants are granted showering provisions in accordance with their faith.

Jewish prisoners, however, are denied and deprived of opening and closing Sabbath services and showers thereafter, all at the hands of anti–semetic prison personal.

State officials argue that Jewish Rabbis and outside volunteers are not available to "facilitate" and/or conduct scheduled religious activities. It is a well–known fact that a rabbi is not allowed to travel on holy days. See District Court Motion Advisory to the Court.

Inasmuch as Jewish prisoners are able to conduct services in the noisy education department, they do so under the indirect supervision of their rabbi via ritual prayer book, The Tehillat Hashem. Realistically through, prison officials have denied and deprived Jewish prisoners of services since September 05, 2003 to the present day. The State Attorney General and defendants have buried these matters, raising a literal smoke screen of bygashery to cover their constitutional violations of Jewish prisoners. This Honorable Court of Appeals should avoid being taken hostage by the Lone Star State of Texas' half–truth.

2... Contrary to the appellees response (page 5, 6) the New Birth (Christian) Bible programs is not held in the unit chapel every Friday night; trial testimony would reveal, for example, that there were not services in the chapel of hope on either February 3rd. Or 10th., 2006 due to lack of security (although five prison officials were playing basketball on the yard). Jewish prisoners were still denied and deprived Sabbath holyday services in the

chapel. Friday is a holy day for jewish prisoner while just another day for Christian offenders; to deny the privacy and intimacy of the Jewish mandated holyday is to violate constitutional protection entitled to Baranowski and other Jewish prisoners.

3... Throughout this civil action, the legal papers submitted to state and federal officials, and the charges presented to local state attorneys, Baranowski has made a good faith effort to relay said violations of state prison officials. The district court allowed the officials to lie, cheat and yes, even steal kosher food products for Jewish prisoners. Other federal district courts have acted, without hesitation. Not in Texas though.

Every court of Appeals in the federal system has ruled infavor of Jewish prisoners in regards to providing kosher diets, regardless of its cost, e.g., Florida has to provide kosher meals for even one Jewish prisoner while Ohio ordered the state to deposit funds into a prisoner's account for kosher food in the prison canteen.

The Loan Star State of Texas admits that "Aleph Institute in Florida provides kosher food at no cost to the State". Yet, at Passover of 2005, when Jewish prisoners ordered food for the eight days of Passover, they had to eat <u>all</u> of the food at one setting and could not take the kosher food back to their cells (as previously done for years), therefore, teh remainder of the food was taken by prison officials, despite prior approval. Despite Jewish prisoners complaints of theft to the local district attorney, the attorney general, and the district judges, the food was

either destroyed or given to other inmates favored by prison officials. A trial at the federal courthouse would have raised these issues and revealed the many constitutional violations suffered by Baranowski and other Jewish prisoners.

4... Prisoner of the christian and muslim faiths are genuinely pampered in Texas prisons while Jewish, Buddhist and Native Americans adherents are hassled and/or discriminated against for trying to practice their own faith of choice. There is <u>always</u> an excuse in Texas prisons.

Prison officials push forth the excuse that if they have to provide kosher food for Jewish prisoners, other population inmates would complain and/or seek equality in food rationing. They, of course, say nothing of prisoners who have the means to go to the unit commissary every two or three days and return to the cell block with (several) days worth of food for their consumption. Once again, prison officials (defendants – assistant attorney general) only reveal half–truths. May the best fib win? The district court believed the defendants ill – willed documents while pushing legal papers filed by Baranowski to the side. Jewish services were, for many years, available on the opening and closing of the Sabbath. But, since the arrival of the new regime of anti-semetic prison officials. Jewish prisoners must fight for the rights, constitutionally guaranteed.

·B·

The Lone Star State of Texas defendants, through counsel, declare that Baranowski's allegations of religious discrimination are conclusory and insufficient to defeat the Appellee's motion for summary judgment (page 8). If given equal opportunity to a jury trial, then Baranowski would summarily defeat such contentions by way of testimony and prison documents and grievances. The defendants don't want that, else they too would have stood by the their original demands for jury trial. Plainly shown, Baranowski has not been given a chance to present real evidence to support his wholesome claims.

·C·

Now how misleading are the defendants when, in their letter brief, they present to the Court, as follows: [at page 3]

"He [Baranowski] also asserted, "kosher food is a must in the Jewish religion and cost should not be a factor. As long as the country sentences people to prison, they have to keep up with the religious freedom act and supply no matter what the cost the Kosher food required . . ."

Once this Court of Appeals reviews Baranowski's response [at page 5], it can be seen that the counsel for defendants took the aforementioned quote out of context. Baranowski did not "assert" the above statement. President George Bush made this comment; no where do defendants give credit to their former Governor on the

issue of providing kosher food to Jewish prisoner. The President acknowledges kosher food a must for Jewish prisoners.

If the federal government will not stand up for Jewish prisoners, and the Texas Governor will not abide by what this nation's president dictates, who will stand in the gap for Baranowski and other Jewish prisoners. It is with sincere hope that ths Court of Appeals will step up to the plate and defend Texas Jewish prisoners as equally as other states courts of appeals have done.

CONCLUSION

Baranowski is of the opinion that he is entitled to relief on the issues presented within this litigation, prepared and depended in good faith for the past twenty nine months. Upon that belief Baranowski prays that this Honorable Court of Appeals will REVERSE the judgment of the district court and REMAND this cause to a court of proper jurisdiction thereafter appointing stand-by-counsel to represent this suit before a trial by jury.

EXECUTED on this the 17th day of February, 2006 and declaring under the penalty of perjury that a copy of this instrument has been served upon opposing counsel of record by U.S. Mail.

Respectfully submitted,

/s/ Thomas Hunter Baranowski
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APPENDIX B

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS H. BARANOWSKI	§	
	§	
Plaintiff-Appellant,	§	No. 05-20646
	§	
and	§	
	§	
ALEPH INSTITUTE	§	
	§	INTERVENOR-APPELLANTS' MOTION TO INTERVENE
and	§	
	§	
JEWISH PRISONER SERVICES INTERNATIONAL	§	
	§	
Intervenor-Appellants,	§	
	§	
v.	§	
	§	
CHAPLAIN LARRY HART, et al.,	§	
	§	
Defendants-Appellees.	§	

INTRODUCTION

Proposed Intervenor–Appellants Aleph Institute ("Aleph") and Jewish Prisoner Services International ("JPSI") respectfully move this Court to allow them to intervene for the sole purpose of submitting to the panel the proposed Petition for Panel Rehearing and Suggestion of Mootness also filed today.[1] Intervenors meet the standard for intervention: they filed this motion as soon as they were aware of the case, and with enough time for the Court to act; Intervenors have a great stake in the outcome of the litigation that will be adversely affected without intervention; and their interests have not been adequately represented by either Baranowski or TDCJ.

Moreover, the Court should allow intervention because the Petition identifies two reasons that this Court lacks jurisdiction to hear the appeal or issue the mandate. First, in September 2006—after this case had been briefed but before the Court's opinion issued—Baranowski changed his official TDCJ religious affiliation from "Jewish" to "none." Therefore, since at least September 2006, Baranowski has lacked standing to bring any of his claims, and this Court has no jurisdiction to hear the appeal. Second, TDCJ has already started providing the Jewish religious accommodations that Baranowski sought—kosher diet and weekly Sabbath services—so

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1 Intervenors note that they would have sought intervention at an earlier stage of the appeal had they been aware of its existence or the fact that Plaintiff no longer claims to be Jewish. Intervenors first learned of the appeal form the Court's May 4, 2007 opinion.

these claims are moot. At the very least, Intervenors ask the Court to rehear the case to provide a sounder factual footing for its decision.

BACKGROUND

Baranowski, a sex offender and a convert from Catholicism to Judaism, filed his *pro se* lawsuit in the Southern District of Texas on September 19, 2003. Judge Rainey granted summary judgment against him on July 15, 2005. Baranowski filed a notice of appeal on August 3, 2005, and briefing to this Court was completed on March 13, 2006.

Baranowski changed his official religious affiliation within TDCJ from"Jewish" to "none" on September 28, 2006, but apparently neither he nor TDCJ notified the Court of this fact. *See* attached Declaration of Bob Moore at ¶ 5. On May 4, 2007, this Court issued its opinion, unaware of Baranowski's change of religious affiliation. Intervenors first became aware of Baranowski's lawsuit when the Court issued its opinion.

While it was briefing this appeal, TDCJ was defending a separate lawsuit seeking a kosher diet for observant Jewish prisoners, *Moussazadeh v. Texas Department of Criminal Justice* et *al.,* No. 9:05-cv-197, E.D. Tex. (filed Oct. 11, 2005). The Eastern District of Texas stayed *Moussazadeh* on April 4, 2006, based on TDCJ's indication that it would consider providing kosher food to Jewish inmates. *See Moussazadeh,* Dkt. No. 55. Since that time, the parties in the *Moussazadeh* case have worked slowly towards a settlement based on TDCJ's provision of kosher

food to observant Jewish prisoners. TDCJ has now set up a kosher kitchen at the Stringfellow Unit outside Houston, determined which Jewish prisoners are kosher–observant, and transferred most of those 30 prisoners to the Stringfellow Unit.[2] As part of its more recent efforts to provide religious accommodations to observant Jewish prisoners, TDCJ is also providing weekly Sabbath services to Jewish prisoners at the Stringfellow Unit. *See* Pet. at 3.

TDCJ's actions and submissions to the District Court for the Eastern District of Texas in the *Moussazadeh* case indicate that many of the main facts relied on by this Court in the May 4 opinion were simply false at the time the Court relied on them. For example, TDCJ documents show that the cast of setting up a kosher kitchen at Stringfellow has been $8,06626, rather than the larger amounts hinted at in the affidavit of Billy Pierce dated October 22, 2004 ("Pierce Affidavit") and relied on heavily by the Court in its May 4 opinion. See Pet. at 4. Moreover, the draft kosher menu submitted by TDCJ as evidence in a hearing last month in Tyler before Magistrate Judge Guthrie indicates that pre–packaged kosher meals will cost at most $2 99, rather than the $15 referred to in the Pierce Affidavit.[3] See Pet. at 4. Finally, TDCJ's concern that providing a special religious diet to some prisoners

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2 Baranowski was presumable not eligible for transfer because he had already changed his official religious affiliation from "Jewish" to "none" by the time of the transfers earlier this year.

3 Pierce's conclusion were, from the face of his affidavit, based on hearsay from the Florida Department of Corrections rather than any independent investigation.

would make other prisoners resentful—a concern relied on by this Court in the May 4 opinion—is now moot since TDCJ is already providing kosher food to observant Jewish prisoners at the Stringfellow Unit. And so far TDCJ has only had to set up one kitchen rather than the several claimed in the Pierce Affidavit. *See* Pet. at 4. TDCJ is also in the process of changing its Jewish religious accommodation policies in other ways, creating "Enhanced Jewish Designated Units" and "Basic Jewish Designated Units." See Pet. 4.

The Court thus has before it an appeal by a prisoner who is no longer Jewish seeking accommodations for Jewish prisoners that TDCJ has already begun providing to its prisoners who are actually Jewish.

INTERVENORS

Intervenors are especially well-placed to brief this court on Jewish religious accommodations in prison, since they are the leading non–profit organizations providing religious services to Jewish prisoners nationwide.

The Aleph Institute is a not–for–profit, national Jewish educational, humanitarian and advocacy organization founded in 1981 by Rabbi Sholom D. Lipskar at the direction of Rabbi Menachem M. Schneerson, the Lubavitcher Rebbe, of blessed memory. Aleph helps Jewish prisoners and their families maintain essential connection to each other and to their spiritual heritage, and provides educational materials to children of Jewish prisoners, counseling to spouses, parents and children,

and financial assistance to families in need. Accordingly, Aleph has a direct interest in how Jewish religious practice is treated in state and federal prisons.

In furtherance of this mission, Aleph cooperates with TDCJ, by providing certain kosher items to Jewish prisoners in TDCJ at Jewish holidays, and by aiding TDCJ's Chaplaincy Department (upon request) in determining whether prisoners are Jewish, and what religious accommodations to provide Jewish prisoners.

Led by Chaplain Gary Friedman, Jewish Prisoner Services International originated as an agency of B'nai B'rith International and was restructured nine years ago into a separate non–profit chaplaincy service. JPSI works in conjunction with all major branches of Judaism and the Jewish Community's other social services agencies to assist Jewish prisoners and their families world–wide. In addition to conducting its own programs, JPSI provides support to localized Jewish chaplaincy programs and its extensively involved with various corrections industry organizations.

Both Intervenors strongly feel that the rights of Jewish prisoners should not be determined by someone who no longer even claims to be Jewish. The Court's May 4 opinion, if not vacated, could make it significantly more difficult for Intervenors, their members and their volunteers to provide services to religious Jewish inmates across the country. In addition, the opinion could be relied on by other courts or agencies as support for the idea that Jewish religious accommodations are too expensive or

to cumbersome provide. In fact, TDCJ's actions over the last year demonstrate that it is not too expensive or cumbersome for TDCJ to provide Jewish religious accommodations such as weekly Sabbath services and a kosher kitchen.

ARGUMENT

To intervene under the FED. R. CIV. P. 24(a) standard,[4] a proposed intervenor must satisfy four elements:

> (1) the application for intervention must be timely, (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

Ford v. *City of Huntsville,* 242 F.3d 235, 239 (5th Cir.

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4 The Fifth Circuit allows intervention on appeal. *See, e.g., Pickle v. International Oilfield Divers, Inc.*, 791 F.2d 1237, 1239 (5th Cir. 1986) (allowing intervention on appeal due to intervenor's "obvious vital interest"). Courts of Appeals typically apply the FED. R. CIV. P. 24(a) standard to determine whether to grant intervention on appeal. *See, e.g., Baker v. Wade*, 743 F.2d 236, 240-44 (5th Cir. 1984) (applying Rule 24(a) standard to motion to intervene on appeal); *Northeast Ohio Coalition for Homeless v. Blackwell*, 467 F.3d 999, 1007 n.2 (6th Cir. 2006) (same).

2001). Intervenors meet all four of these elements.

Under the first element, timeliness, there is another four-factor test:

> (1) the length of time during which the would–be intervenor actually knew or reasonably should have known of its interest in the action before petitioning for leave to intervene, (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would–be intervenor's failure to apply for intervention as soon as it actually knew or reasonably should have known of its interest in the action, (3) the extent of the prejudice that the would-be intervenor may suffer if its petition for leave to intervene is denied, [and] (4) the existence of unusual circumstances militating either for or against a determination that the application is timely.

Stallworth v. Monsanto, 558 F.2d 257, 264–66 (5th Cir. 1977). The application of these factors is "contextual": [t]he requirement of timeliness is not a tool of retribution to punish the tardy would–be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner. Federal courts should allow intervention 'where no one would be hurt and greater justice could be attained.'" *Sierra Club v. Espy,* 18 F.3d 1202, 1205 (5th Cir. 1994) (quoting *McDonald v. E.J. Lavino Co.,* 430 F.2d 1065, 1074 (5th Cir. 1970)).

Here, Intervenors meet all four timeliness factors. Intervenors only knew of this action after the Court published its opinion on Friday, May 4. Only 14 days have passed since that decision was published.

The second factor of the timeliness test, "the extent of prejudice to the existing parties as a result of the applicant's delay in seeking intervention," "must be measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervenor to participate in the litigation." *Sierra Club,* 18 F.3d at 1206. Neither Baranowski nor TDCJ have been prejudiced by what has occurred in the 14 days that have passed since the Court filed its opinion. Moreover, no prejudice is possible, since Baranowski no longer claims to be Jewish, and TDCJ is already starting to provide Jewish prisoners the religious accommodations he requested.

Under the third timeliness factor, Intervenors will be greatly prejudiced if the intervention is denied, since their ability to minister to observant Jewish prisoners will be limited in the Fifth Circuit and else where if the opinion is not vacated.

And with respect to the fourth factor, there is a very "unusual circumstance" here. Both of the parties were aware of the facts that would deprive this Court of jurisdiction over this appeal—i.e., that Baranowski was no longer Jewish and that TDCJ was taking steps to provide the Jewish accommodations in the suit—but did not provide the Court with this information. Because

neither of the parties informed the Court of facts that would deprive this Court of jurisdiction, it falls to Intervenors, who only just learned of this appeal at all, to inform the Court of these facts.

Since they meet all four of the *Stallworth* factors, Intervenors timely filed this motion to intervene. This Court should allow intervention because no "one would be hurt and greater justice could be attained." *Sierra Club,* 18 F.3d at 1205.

Intervenors also meet the other three elements of the Rule 24(a) test. The second element is met because Intervenors have a "direct, substantial, [and] legally protectable" interest in ensuring that a kosher diet, weekly Sabbath services, and other Jewish religious accommodations are provided to the Jewish prisoners they minister to. *Sierra Club*, 18 F.3d at 1207. Not only do they have an interest on behalf of the prisoners they assist—they also have an interest on behalf of their members and volunteers, for whom helping Jewish prisoners keep religion is a mitzvah. *Cf. Supreme Beef Processors, Inc. v. United* States *Dept. of Agriculture,* 275 F.3d 432, 437 n.14 (5th Cir. 2001) ("application of a performance standard that affects intervenor's] members" constitutes protectable interest under Rule 24(a)).

The third element is that Intervenors "be so situated that the disposition of the action may, as a practical matter, impair or impede [their] ability to protect [their] interest." *Ford,* 242 F.3d at 239. Here, the precedential effects of the Court's opinion standing alone constitute an impairment to the Intervenors 'interest:' "an intervenor's

interest 'is impaired by the *stare decisis* effect of the district court's judgment.'" *Sierra Club,* 18 F.3d at 1207.

The fourth element, inadequate representation, constitutes a "'minimal'" burden on Intervenors. *Sierra Club,* 18 F.3d at 1207 (quoting *Trbovich v. United Mine Workers,* 404 U.S. 528, 538 n.10 (1972))."The applicant need only show that representation may be' inadequate." *Id.* The mere fact that neither Baranowski nor TDCJ informed the Court that he no longer claimed to be Jewish demonstrates inadequate representation. The same is true of the failure of either party to inform this Court of TDCJ's policies concerning Jewish accommodations.

Intervenors have met all four elements of the *Stallworth* test for intervention.

CONCLUSION

For the foregoing reason, Intervenors respectfully request that the Court grant the Motion to Intervene and allow the proposed Petition for Panel Rehearing and Suggestion of Mootness to be filed.

Respectfully submitted

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Attorneys for Proposed Intervenor-Appellants
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I have this 18th day of May 2007 served a true and correct copy of the above and foregoing upon the following persons by placing the same in the U.S. Mail, with sufficient first class postage to assure delivery and addressed as follows:

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TDCJ
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS H. BARANOWSKI	§	
	§	
Plaintiff-Appellant,	§	No. 05-20646
	§	
and	§	
	§	
ALEPH INSTITUTE	§	
	§	INTERVENOR-
and	§	APPELLANTS'
	§	PETITION FOR
JEWISH PRISONER	§	PANEL
SERVICES INTERNATIONAL	§	REHEARING
	§	AND
Intervenor-Appellants,	§	SUGGESTION
	§	OF MOOTNESS
v.	§	
	§	
CHAPLAIN LARRY	§	
HART, et al.,	§	
	§	
Defendants-Appellees.	§	

INTRODUCTION

Intervenor-Appelleants Aleph Institute ("Aleph") and Jewish Prisoner Services International ("JPSI") respectfully petition this Court for panel rehearing under FED. R. APP. P. 40, suggest mootness of the appeal, and request that the Court vacate its opinion dated May 4, 2007, vacate the judgment of the district court, and dismiss the appeal for lack of jurisdiction. There are two reasons this Court lacks jurisdiction over this appeal.

First, Plaintiff–Appellant Thomas Baranowski declared himself no longer Jewish in September 2006, six months after briefing in this case was completed, and eight months before this Court rendered its decision on his appeal. Since the appeal was based solely on his requests for accommodation of his claimed Jewish religious beliefs, once he decided he was no longer Jewish, he lost standing, and this Court lost jurisdiction to hear his appeal. Neither Baranowski nor Appellees–Defendants informed the Court of this jurisdictional fact.

Second, since briefing was completed in May 2006, the Texas Department of Criminal Justice ("TDCJ") has begun providing all of the accommodations Baranowski sought, including a kosher diet for observant Jewish prisoners, and weekly Sabbath services at an "Enhanced Designated Jewish Unit."This directly contradicts TDCJ's arguments to this Court and the district court that it could not provide these accommodations. In any case, since the relief sought has been provided by TDCJ, this appeal is moot, and the Court lacks jurisdiction over the appeal. The Court should therefore vacate its decision and the district court's and dismiss the appeal for lack of jurisdiction.

BACKGROUND

Baranowski, a sex offender and a convert from Catholicism to Judaism, filed his *pro se* lawsuit in the Southern District of Texas on September 19, 2003. Judge Rainey granted summary judgment against him on July 15, 2005. Baranowski filed a notice of appeal on August 3, 2005, and briefing to this Court was completed on March 13, 2006.

Baranowski changed his official religious affiliation within TDCJ from "Jewish" to "none" on September 28, 2006, but apparently neither he nor TDCJ notified the Court of this fact. *See* attached Declaration of Bob Moore at ¶5.On May 4, 2007, this Court issued its opinion, unaware of Baranowski's change of religious affiliation. Intervenors first became aware of Baranowski's lawsuit when the Court issued its opinion.

While it was briefing this appeal, TDCJ was defending a separate lawsuit seeking a kosher diet for observant Jewish prisoners, *Moussazadeh v. Texas Department of Criminal* Justice et *al.,* No. 9:05-cv-197, E.D. Tex. (filed Oct. 11, 2005). The Eastern District of Texas stayed *Moussazadeh* on. April 4, 2006, based on TDCJ's indication that it would consider providing kosher food to Jewish inmates. *See* Ex. A. Since that time, the parties in the *Moussazadeh* case have worked slowly towards a settlement based on TDCJ's provision of kosher food to observant Jewish prisoners. TDCJ has now set up a kosher kitchen at the Stringfellow Unit outside Houston, determined which Jewish prisoners are kosher–observant, and transferred most of those 30 prisoners to the Stringfellow Unit.[1] *See* Exs. B and C. As part of its more recent efforts to provide religious accommodations to observant Jewish prisoners, TDCJ is also providing weekly Sabbath services to Jewish prisoners at the Stringfellow Unit. *See* Ex. C.

TDCJ's actions and submissions to the District Court for the Eastern District of Texas in the *Moussazadeh* case indicate that many of the main facts relied on by this Court in the May 4 opinion were simply false at the time the Court relied on them. For example, TDCJ documents show that the cost of setting up a kosher kitchen at Stringfellow has been $8,066.26, rather than the larger amounts hinted at in the affidavit of Billy Pierce dated

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1 Baranowski was presumable not eligible for transfer because he had already changed his official religious affiliation from "Jewish" to "none" by the time of the transfers earlier this year.

October 22, 2004 ("Pierce Affidavit") and relied on heavily by the Court in its May 4 opinion. *See* Ex. D, p. 7. Moreover, the draft kosher menu submitted by TDCJ as evidence in a hearing last month in Tyler before Magistrate Judge Guthrie indicates that pre–packaged kosher meals will cost at most $2.99, rather than the $15 referred to in the Pierce Affidavit.[2] *See* Ex. E. Finally, TDCJ's concern that providing a special religious diet to some prisoners would make other prisoners resentful—a concern relied on by this Court in the May 4 opinion—is now moot since TDCJ is already providing kosher food to observant Jewish prisoners at the Stringfellow Unit. And so far TDCJ has only had to set up one kitchen rather than the several claimed in the Pierce Affidavit. *See* Ex. C. TDCJ is also in the process of changing its Jewish religious accommodation policies in other ways, creating "Enhanced Jewish Designated Units" and "Basic Jewish Designated Units." *See* Ex. F.

The Court thus has before it an appeal by a prisoner who is no longer Jewish seeking accommodations for Jewish prisoners that TDCJ has already begun providing to its prisoners who are actually Jewish.

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2 Pierce's conclusions were, from the face of his affidavit, based on hearsay from the Florida Department of Corrections rather than any independent investigation.

ARGUMENT

Under FIFTH CIR. R. 40.2, "[a] petition for rehearing is intended to bring to the attention of the panel claimed errors of fact or law in the opinion. *Id.* Here, errors of fact—that Baranowski is Jewish and that TDCJ cannot provide certain Jewish religious accommodations—were the primary bases for the Court's decision. Those errors of fact led to errors of law. Specifically, the appeal should have been dismissed for lack of jurisdiction once Baranowski stopped claiming to be Jewish, since he lost standing to bring that claim at that time. Now that the Court is aware of that fact, it should vacate its opinion and the district court's opinion. Moreover, the relief sought by Baranowski—a kosher diet and Sabbath services—are now being given to observant Jewish prisoners in TDCJ. His appeal has therefore been moot since TDCJ began providing those accommodations earlier this year.

A. Baranowski Has Lacked Standing Since September 2006

Baranowski has not had the requisite standing to maintain any of his claims since September 2006, when he changed his official religious affiliation from"Jewish" to "none." A prisoner who no longer claims to be Jewish cannot bring Free Exercise, Equal Protection, or RLUIPA claims based on how Jewish prisoners are treated by the Texas Department of Criminal Justice ("TDCJ"). "To have Article III standing to pursue an alleged violation of the Free Exercise Clause, a plaintiff must allege that his or

her own 'particular religious freedoms are infringed.'" "*Littlefield v. Forney Indep. Sch.* Dist., 268 F.3d 275, 292 n.25 (5th Cir. 2001) (quoting Sch. *Dist. of Abington* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963)) (other citation omitted). Baranowski's lack of standing since at least September 2006 deprives this Court of jurisdiction over the entire appeal because all of his claims were predicated on his claimed Jewish religious beliefs.

B. TDCJ's Recent Accommodations Moot the Appeal

As described above, TDCJ has, since briefing on this appeal was completed in March 2006, begun to provide to observant Jewish prisoners the religious accommodations that Baranowski sought in this appeal. By beginning to make these accommodations, TDCJ has rendered all or part of the appeal moot.

In addition, it is clear that most of the facts the Court relied on were simply false—TDCJ can create a kosher kitchen, it can provide weekly Sabbath services, it can provide a kosher menu at low cost, and it won't disrupt the running of the prison systems for some prisoners to receive special religious diets. Thus even if the appeal is not entirely mooted by TDCJ's accommodations, the Court should grant the petition for rehearing to ensure that a correct factual record underlies its opinion, and to correct the conclusions of law based on the erroneous facts already presented to it.

CONCLUSION

This Court lacks jurisdiction over this appeal. Since this Court's mandate has yet to issue, it retains the ability to determine its jurisdiction over the appeal. *See*, e.g., Brotherhood *of Railroad Trainmen v. Central of* Ga. Ry. Co., 243 F.2d 793, 793 (5th Cir. 1957) (per curiam) (upon suggestion of mootness, Fifth Circuit vacated both its own judgment and the District Court's).

For the foregoing reasons, Intervenors respectfully request that the Court grant the Petition for Panel Rehearing, vacate its May 4 opinion and the district court's judgment, and dismiss the appeal for lack of jurisdiction.

Respectfully submitted,

/s/ Derek L. Gaubatz
Anthony R. Picarello, Jr.
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THOMAS H. BARANOWSKI	§	
	§	
Plaintiff-Appellant,	§	No. 05-20646
	§	
and	§	
	§	
ALEPH INSTITUTE	§	
	§	DECLARATION
and	§	OF BOB MOORE
	§	IN SUPPORT OF
JEWISH PRISONER	§	MOTION TO
SERVICES INTERNATIONAL	§	INTERVENE
	§	
Intervenor-Appellants,	§	
	§	
v.	§	
	§	
CHAPLAIN LARRY	§	
HART, et al.,	§	
	§	
Defendants-Appellees.	§	

1. My name is Bob Moore. I am an employee of the Aleph Institute, whose offices are at 9540 Collins Avenue, Miami, Florida 33154-7127. I have personal knowledge of all of the contents of this declaration.

2. The Aleph Institute is a not–for–profit, national Jewish educational, humanitarian and advocacy organization founded in 1981 by Rabbi Sholom D. Lipskar at the direction of Rabbi Menachem M. Schneerson, the Lubavitcher Rebbe, of blessed memory. Aleph helps Jewish prisoners and their families maintain essential connection to each other and to their spiritual heritage, and provides educational materials to children of Jewish prisoners, counseling to spouses, parents and children, and financial assistance to families in need. Accordingly, Aleph has a direct interest in how Jewish religious practice is treated in state and federal prisons.

3. In furtherance of this mission, Aleph cooperates with TDCJ, by providing certain kosher items to Jewish prisoners in TDCJ at Jewish holidays, and by aiding TDCJ' s Chaplaincy Department in determining whether prisoners are Jewish, and what religious accommodations to provide Jewish prisoners.

4. In conjunction with our ministry to Jewish inmates, the Aleph Institute maintains a list of Jewish inmates within the custody of TDCJ and other state and federal prison systems. Part of our efforts to ensure that this list is accurate involves contacting chaplaincy offices in state prisons to see what inmates have identified themselves as Jewish.

5. Mr. Thomas M. Baranowski does not presently appear on the Aleph Institute's list of Jewish inmates within the custody of TDCJ. I contacted a representative of TDCJ' s chaplaincy office to determine whether Baranowski identified himself as Jewish. I learned from the representative of the TDCJ chaplaincy office that in September 2006, Baranowski changed his religious affiliation from "Jewish" to "None."

I swear under penalty of perjury and the laws of this Court that the foregoing is true and correct.

_____

Bob Moore
May 18, 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20646

THOMAS H. BARANOWSKI
Plaintiff-Appellant
v.
CHAPLAIN LARRY HART; LAWRENCE N. HOGES, Huntsville Unit Warden; TED SANDERS, Rabbi TDCJ Chaplaincy Department; BILL PIERCE, TDCJ Chaplaincy Department; DOUGLAS DRETKE, TDCJ-ID Director
Defendants-Appellees

Appeal from the United States District Court
for the
Southern District of Texas, Houston

O R D E R :

IT IS ORDERED that the motion of Aleph Institute and Jewish Prisoner Services International to intervene on behalf of appellant is DENIED.

IT IS FURTHER ORDERED that motion of Aleph Institute and Jewish Prisoner Services International to file a petition for rehearing is DENIED.

SIGNED on June 8, 2007 in New Orleans, LA.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES CIRCUIT JUDGE

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